

# PRIORITIES IN FIXTURE COLLATERAL IN OHIO: A PROPOSAL FOR REFORM

VINCENT M. NATHAN \*

## I. INTRODUCTION

When the Ohio legislature adopted the Uniform Commercial Code in 1961, it incorporated the uniform rule governing priority of security interests in fixtures.<sup>1</sup> The Ohio provision was criticized immediately by writers and attorneys representing real estate interests who claimed that the statute was inconsistent with the fixture law of the state and harmful to the legitimate interests of real estate mortgagees and purchasers. Primarily as a result of the efforts of the Ohio Savings and Loan League,

---

\* Professor of Law, University of Toledo.

<sup>1</sup> Section 9-313 of UNIFORM COMMERCIAL CODE [hereinafter cited as the U.C.C.] was revised in 1956 and remained unchanged in the 1962 Official Text. Ohio adopted the U.C.C. in 1961, effective July 1, 1962. The 1962 text of § 9-313 which the Ohio legislature adopted without change reads as follows:

### *Section 9-313. Priority of Security Interests in Fixtures*

(1) The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

(3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

(4) The security interests described in subsections (2) and (3) do not take priority over

- (a) a subsequent purchaser for value of any interest in the real estate; or
- (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or
- (c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(5) When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

amendatory legislation was introduced in the legislature and passed in 1963; the revised Ohio version of U.C.C. § 9-313 which was adopted reversed the basic priority provisions of the uniform law.<sup>2</sup>

Ohio was not the only jurisdiction to reject the uniform text of § 9-313. The California legislature omitted the section, preferring to leave problems of priorities to existing real estate law. Iowa, by specific legislative enactment, rendered Article 9 inapplicable to priority conflicts concerning fixtures in situations in which one of the claimants is the holder of an interest in real estate.<sup>3</sup> The Florida legislature changed its mind about the desirability of the uniform provision and adopted a statute identical to the 1963 Ohio law.<sup>4</sup> Idaho reversed the uniform section's priority as it affected a person with an interest in the real estate when the goods become fixtures, but retained the U.C.C. priority in regard to subsequent real estate interests.<sup>5</sup> The real and apparent difficulties resulting from § 9-313 have been commented upon by numerous writers<sup>6</sup> and have resulted

---

<sup>2</sup> OHIO REV. CODE ANN. § 1309.32 (Page Supp. 1972).

*Priority of security interests in fixtures.*

(A) The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work, and the like and no security interest in them exists under sections 1309.01 to 1309.50, inclusive, of the Revised Code unless the structure remains personal property under applicable law. The law of this state other than Chapters 1301., 1302., 1303., 1304., 1305., 1306., 1307., 1308., and 1309. of the Revised Code, determines whether and when other goods become fixtures. Chapters 1301., 1302., 1303., 1304., 1305., 1306., 1307., 1308., and 1309. of the Revised Code do not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

(B) A security interest in goods which are or become fixtures is invalid against any person with an interest in the real estate at the time the security interest in the goods is perfected or at the time the goods are affixed to the real estate, whichever occurs later, who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

A security interest in goods which are or become fixtures takes priority as to the goods over the claims of all persons acquiring interests in the real estate subsequent to the perfection of such security interest or the affixing of the goods to the real estate, whichever occurs later.

(C) When under division (B) of this section a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of sections 1309.44 to 1309.50, inclusive, of the Revised Code, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. The secured party shall give reasonable notification of his intention to remove the collateral to all persons entitled to reimbursement.

<sup>3</sup> IOWA CODE § 554.9313 (1967).

<sup>4</sup> FLA. STAT. ANN. § 679.9-313(2), (3) (1972 Supp.).

<sup>5</sup> IDAHO CODE § 28-9-313(2) (1967):

<sup>6</sup> See, e.g., 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 30.1-30.6 (1965) [hereinafter cited as G. GILMORE]; Coogan, *Fixtures — Uniformity in Words or Fact?*, 113 U. PA. L. REV. 1186 (1965); Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44 (1964) [hereinafter cited as Kripke].

in efforts to redraft the section to take account of certain criticisms.<sup>7</sup> In 1971, proposals for change were included in the Final Report of the Article 9 Review Committee,<sup>8</sup> and these recommendations became part of the 1972 Official Text of the Uniform Commercial Code.<sup>9</sup>

---

<sup>7</sup> The Review Committee for Article 9 of the U.C.C. released preliminary drafts of revised versions of § 9-313 in 1968 and 1970.

<sup>8</sup> PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, FINAL REPORT (April 25, 1971).

<sup>9</sup> U.C.C. § 9-313 (1972 Official Text).

*Priority of Security Interests in Fixtures*

(1) In this section and in the provisions of Part 4 of this Article referring to fixture filing, unless the context otherwise requires

(a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law.

(b) a "fixture filing" is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of Section 9-402.

(c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this Article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this Article in ordinary building materials incorporated into an improvement on land.

(3) This Article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article; or

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

The 1972 Official Text amounts to a significant and widespread amendment of Article 9 generally, quite apart from its effect upon § 9-313. As such it deserves careful consideration by state legislatures.<sup>10</sup> This article is concerned with Ohio's response to the new version of U.C.C. § 9-313. An ideal opportunity has presented itself for the Ohio legislature to consider the wisdom of its action in 1963 when it adopted the then unique version of the fixture security interest priority rule.<sup>11</sup> It is the author's opinion that Ohio should adopt the 1972 version of § 9-313 with modifications to be described which will not interfere with the goal of uniformity sought by the sponsors of the uniform act.

## II. ANALYSIS OF THE 1962 UNIFORM FIXTURE PRIORITY PROVISION

### A. *Criticisms of § 9-313*

In order to determine the desirability of legislative adoption of the 1972 uniform fixture priority provision, it is useful to consider the nature of the criticisms which were leveled against Ohio's adoption of the earlier uniform act, the extent to which these criticisms are reflected in Ohio's present statute, and the validity of the arguments which resulted in Ohio's rejection of the uniform provision. One commentator, in an article which was prepared before Ohio's adoption of its 1963 amendment but published thereafter, made the following criticisms of the original Ohio statute: The concept of "detachable fixture" introduced by § 9-313 is incompatible with Ohio common law which defines a fixture as realty which is not subject to removal by a creditor; section 9-313(2) endows an Article 9 secured creditor with a super-priority over existing real estate interests; and the fixture security interest recognized by § 9-313 constitutes a secret lien—in some situations no public filing is required; in others the filing is not de-

---

(7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

<sup>10</sup> The 1972 amendments have already been adopted in Illinois, effective July 1, 1973, and in Arkansas and North Dakota, effective January 1, 1974.

<sup>11</sup> One author has described the Ohio legislature's action in the following terms: "Thus, in rejecting Section 9-313, Ohio has not really affirmed a long-standing policy or line of decisions; it would appear, rather, that it has chosen a new, uncharted road." Shanker, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788, 789 (1964) [hereinafter cited as Shanker].

signed to come to the attention of a holder of a conflicting real estate interest.<sup>12</sup>

Another commentator has suggested that the removal provisions of § 9-313(5) may have been the most objectionable feature of the 1962 version. When the fixture subject to the security interest is a vital replacement item such as an elevator or furnace, removal of the fixture upon the debtor's default may render a building completely or nearly useless.<sup>13</sup> A related, but somewhat different, criticism was advanced by the Ohio Savings and Loan League. The replacement of items originally subject to the real estate mortgage by new fixtures subject to Article 9 security interests might result in diminishing substantially the value of the mortgagee's security.<sup>14</sup> Other League objections related to the filing of financing statements under the name of non-owners of the real estate (*e.g.*, tenants) and concern that Ohio cases seemed to indicate a trend in favor of enlarging the classification of fixtures.<sup>15</sup>

### B. *The Ohio Amendment of § 9-313*

In response to such criticisms, the Ohio legislature replaced the uniform text of § 9-313 with the provision which is now Ohio law. By subjecting a fixture security interest to all real estate interests in existence "at the time the security interest in the goods is perfected or at the time the goods are affixed to the real estate, whichever occurs later,"<sup>16</sup> the legislature met many of the objections which were raised against the uniform provision. No longer may the unperfected secured party whose security interest has attached to goods before they become fixtures have priority over existing real estate interests. Indeed, absent a written disclaimer by the possessor of the real estate interest, there is no way for the fixture lender to obtain a priority over existing real estate interests. All that is left to the fixture lender is the possibility of obtaining a priority over real estate interests which arise after perfection of the fixture security interest or the affixing of the goods to the real estate, whichever occurs later. In order to perfect his security interest and thus obtain this priority over subsequent real estate interests, the fixture lender must file a financing state-

---

<sup>12</sup> Hollander, *Imperfections in Perfection of Ohio Fixture Liens*, 14 WEST. RES. L. REV. 683 (1963) [hereinafter cited as Hollander].

<sup>13</sup> Shanker, *supra* note 11, at 806.

<sup>14</sup> Letter from William W. Taft to Jerome Parker, the author's research assistant, April 30, 1973.

<sup>15</sup> *Id.* See also Burns, *Some Specific Problems Raised by Article 9 of the Uniform Commercial Code in Ohio*, 14 WEST. RES. L. REV. 56 (1962).

<sup>16</sup> OHIO REV. CODE ANN. § 1309.32(B) (Page Supp. 1972). The only exception occurs when the possessor of the real estate interest disclaims in writing an interest in the goods as fixtures.

ment.<sup>17</sup> Put simply, the legislation reversed the priority scheme of the uniform act.

In addition the 1963 legislature adopted several amendments to filing procedures in Ohio, which were designed to insure that the fixture interest would come to the attention of searchers of the real estate records. "When the financing statement covers . . . goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned *and the name of the record owner or record lessee thereof.*"<sup>18</sup> A financing statement covering fixtures must "contain a reference to the recorder's file number of the mortgage upon real estate or to the volume and page of the mortgage record in which such mortgage is recorded,"<sup>19</sup> and the financing statement must be indexed "in the real estate mortgage records by the filing officer according to the name of the owner or lessee given in the [financing] statement."<sup>20</sup> Thus all elements of the "super-priority" of the fixture security interest and any suggested secrecy of such an interest have been eliminated.

To provide protection even for a holder of a subsequent real estate interest which is subordinate to the fixture security interest, the revised Ohio provision requires that "[t]he secured party shall give reasonable notification of his intention to remove the collateral to all persons entitled to reimbursement."<sup>21</sup> Thus even if the fixture lender has a priority over the real estate interest holder, notice must be given to the latter in order to permit him to protect his interests by contesting the right of the fixture lender to remove or by paying off the fixture lender.

The fixture financier can no longer impinge upon the security of an earlier real estate interest holder by removing a vital fixture, since it is impossible for the fixture financier to obtain an interest superior to that of the prior mortgagee. Nor will the security of a prior mortgagee be reduced as the result of replacement of items originally subject to the real estate mortgage by new fixtures which add no new value to the real estate. The scheme established by the revised Ohio statute constitutes a virtually complete victory for real estate interests and places the fixture lender in an untenable position unless his debtor is the sole party interested in the realty to which the goods in question are related.<sup>22</sup>

---

<sup>17</sup> OHIO REV. CODE ANN. § 1309.21 (Page Supp. 1972). Under § 1309.21 (a) (4) even a purchase money security interest in consumer goods is subject to the filing requirement if the chattel is a fixture.

<sup>18</sup> OHIO REV. CODE ANN. § 1309.39(A) (Page Supp. 1972) (emphasis in text added).

<sup>19</sup> OHIO REV. CODE ANN. § 1309.40(B) (2) (Page Supp. 1972).

<sup>20</sup> OHIO REV. CODE ANN. § 1309.40(D) (Page Supp. 1972).

<sup>21</sup> OHIO REV. CODE ANN. § 1309.32(C) (Page Supp. 1972).

<sup>22</sup> Following the action by the Ohio legislature in revising the fixture priority provision, Mr. Hollander wrote that "the real estate lien has been restored to its precode position, and the doctrine of the *Holland Furance* case has been reestablished." Hollander, *supra* note 12, at 698. His reference is to *Holland Furance Co. v. Trumbull Sav. & Loan Co.*, 135

Left unresolved by the revised Ohio provision, however, is the problem of the "detachable fixture." In order to obtain a priority over a subsequent real estate interest, the fixture lender must know whether the goods which are subject to his security interests are or may become fixtures.<sup>23</sup> The dearth of Ohio cases since 1963<sup>24</sup> suggests that the amended Ohio statute has relegated that question to one of little importance in view of the strong position of real estate interest holders.<sup>25</sup> This problem of defining a fixture in connection with the fixture priority provision of the Code, however, is one which cannot be ignored forever. This is particularly true if the Ohio legislature is to give consideration to adopting the 1972 uniform provision, which in some instances would recognize the superior interest of fixture financiers over holders of existing real estate interests.

### C. *The Functioning of the U.C.C. and the Ohio Fixture Rule*

The criticisms which led the Ohio legislature to reject the uniform version of § 9-313 fall into three categories. The first of these relates to the basic question of the appropriateness of the resolution of the priority issue between the fixture lender and the holder of a real estate interest. The second amounts to a charge that § 9-313 represents a backward step

---

Ohio St. 48, 19 N.E.2d 273 (1939). This is an overly broad reading of *Holland Furnace*. As has been pointed out by Professor Shanker, the decision in that case was limited expressly to the resolution of the question of the rights of a subsequent purchaser for value, without notice of the interest of the fixture lender. The court treats the fact that the subsequent purchaser happened also to be a prior mortgagee as irrelevant. Professor Shanker is correct when he states that "[t]he few Ohio cases specifically dealing with the conflict between the prior land interest and the fixture security interest usually followed Section 9-313's approach favoring the fixture security interest, at least where removal of the fixture could be accomplished without material injury to the building." Shanker, *supra* note 11, at 789.

<sup>23</sup> Such a determination is necessary in order to know what filing requirements must be met. The question, whether or not goods which will be used in connection with realty will become fixtures under Ohio law, will also be important to a seller of goods who can obtain a priority over *existing* realty interests only if the goods are determined not to be fixtures.

<sup>24</sup> The only Ohio case since the 1963 amendment dealing with priorities between a mortgagee and a fixture lender is *Exchange Leasing Corp. v. Aegen*, 7 Ohio App. 2d 11, 218 N.E.2d 633 (1966). In that case the Cuyahoga County Court of Appeals held that carpeting which had been cut to room size and attached to unfinished floors in an apartment building had lost its identity as personalty and had become a part of the realty. A purchase/lease back arrangement entered into between the owner of the building and the plaintiff (who was attempting to repossess the carpeting upon the owner's default) was held to be ineffective in so far as it affected the rights of the prior mortgagee. Although the facts of the case are somewhat ambiguous, this lease arrangement was apparently one "intended as security" under U.C.C. § 9-102 and U.C.C. § 1-201 (37). Apparently no financing statement was ever filed by the plaintiff. The opinion makes no reference to the Uniform Commercial Code, but holds that the lease arrangement was ineffective to vest any interest in the plaintiff-fixture lender superior to that of the mortgagee. The case is easily resolvable under Ohio Rev. Code § 1309.32, since the plaintiff's security interest would be invalid against a mortgagee who held an interest in the real estate at the time the lease arrangement was executed.

<sup>25</sup> The chief area of potential conflict, and hence the primary area of litigation, involves an existing real estate interest holder and the seller of goods who wishes to obtain a purchase money security interest which will prevail even when the goods become fixtures. This is impossible under Ohio law, absent the consent of the real estate interest holder. OHIO REV. CODE ANN. § 1309.32 (Page Supp. 1972).

in the direction of the creation of secret liens. Finally it has been suggested that § 9-313 makes an assumption about fixtures which is in basic conflict with Ohio common law. Ohio law, according to this last argument, fails to recognize the concept of "removable fixture" which the Code assumes in § 9-313(5).

### 1. Priority between Fixture Lender and Holder of Real Estate Interest

The 1962 version of § 9-313 creates a priority on behalf of the fixture lender over all real estate interests in existence at the time of the attachment of the security interest. All that is required is that the fixture security interest attach to the goods before they become fixtures.<sup>26</sup> No perfection of any kind is required in order to sustain this priority. The practical effect of this provision is to advantage a purchase money secured creditor who extends credit on the sale of a chattel which will become a fixture. In the rare case of a lender who accepts an existing fixture as collateral, the lender's security interest "is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods"<sup>27</sup> unless the real estate interest holder disclaims his interest in writing.

The rationale behind the preferred status of the purchase money lender over the existing real estate interest holder is that the former's extension of credit makes the purchase of a new asset by the debtor possible. The assumption is that the effect of the transaction is to increase the value of the realty, and thus the value of the mortgagee's security.<sup>28</sup> The effect of the Code's priority scheme is to permit an owner of realty to turn to sources other than his mortgagee for credit necessary to support the renovation and upkeep of his property through the purchase of new fixtures; likewise, plant expansion and modernization are facilitated.<sup>29</sup>

---

<sup>26</sup> The security interest attaches when (1) the parties agree that it attach, (2) value is given, and (3) the debtor obtains rights in the collateral. U.C.C. § 9-204 (1962 Official Text).

<sup>27</sup> U.C.C. § 9-313(3) (1962 Official Text).

<sup>28</sup> The mortgagee of course will have a secondary interest in the fixture under the terms of mortgage. As the purchase money lender's interest is satisfied by the debtor's payments, the mortgagee acquires additional primary security. U.C.C. § 9-313(1) provides that "[t]his act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate."

<sup>29</sup> Mr. Hollander has suggested that the purchase money lender's priority is not necessary to allow plant expansion in Ohio, "since detachable machinery is likely to be personality in Ohio." Hollander, *supra* note 12, at 687. He relies upon two cases, *Zangerle v. Republic Steel Corp.*, 144 Ohio St. 529, 60 N.E.2d 170 (1945) and *Standard Oil Co. v. Zangerle*, 141 Ohio St. 505, 49 N.E.2d 406 (1943). Both of these cases involved classification of property for the purpose of state taxation, and therefore do not provide much information as to how a court will classify detachable machinery in a different context. Indeed, the court in *Republic* made it clear that its decision that certain machinery did not constitute improvements on land for the purpose of taxation was limited to its context. The *Standard Oil* case concerns the question of the application of the defense of *res judicata* to a prior determination of the classification of property for the purpose of taxation. For further discussion of



To the extent that the fixture is a new and additional asset to the structure, the mortgagee hardly has a basis for complaint. In making his original credit decision, the mortgagee did not rely upon fixtures not then in existence. Thus, even his secondary interest in the fixture constitutes a windfall in the form of additional security; for him to suggest that he is entitled to priority over the purchase money lender as to such new asset is unreasonable and amounts to a claim that he, the mortgagee, became the sole source of credit for the owner in connection with improvement of the property by addition of fixtures. The point is so obvious that even critics of § 9-313 have not advanced any argument to the contrary respecting pure additions to the property in the form of fixtures.

A somewhat different issue arises, however, when the owner of property *replaces* an existing fixture with a new one. This may result in removal of collateral as to which the mortgagee has a primary interest and its replacement by a fixture in which a purchase money lender obtains a priority under § 9-313. At least a partial answer to this question is provided by common sense. Few home owners, landlords, or factory owners will replace valuable fixtures simply for the purpose of reducing the security of their mortgages. A more realistic assumption is that fixtures will be replaced by an owner only when such replacement is necessary and will benefit the owner economically. Thus what the mortgagee is likely to be deprived of in many cases will be worn out or outmoded fixtures; in place of these he will obtain a secondary interest in new and more valuable fixtures.

Other arguments raised against the priority of the purchase money secured party over the prior mortgagee relate to the damage which may result to the real estate (and thus to the mortgagee's security) as a result of removal of collateral under U.C.C. § 9-313(5). Although the secured creditor must reimburse the real estate interest holder for physical injury to the property resulting from the removal, he is not required to pay for diminution in value of the real property resulting from the absence of the goods or the need to replace them. It has been argued that the mortgagee has a valid complaint if § 9-313 permits the removal of a fixture which is essential to the functioning of the structure to which it is affixed. Assuming that such a result may be possible under § 9-313, the argument ignores the real world in which the mortgagee and secured creditor operate. The removal of an essential fixture as a result of the debtor's default normally will be of little financial advantage to the secured creditor and will be positively harmful to the mortgagee; under these circumstances a different solution is likely to be found by the parties.

An elevator, furnace, or air-conditioning system which is removed from

---

the irrelevancy of tax case precedents to the questions presented by § 9-313, see text accompanying footnotes 48 to 54 *infra*.

the structure to which it has been affixed is unlikely to have sufficient resale value to cause the secured creditor to actively seek removal. The value of the creditor's right to remove is more likely to consist of the threat of removal. If the debtor is in default on payments to his mortgagee as well as to his secured creditor, both of these parties will prefer to avail themselves of foreclosure provisions. Another possibility is that the mortgagee will find it financially advantageous to pay off the secured creditor and thus obtain a priority as to the fixture.<sup>30</sup> Yet another device available to a mortgagee who is troubled about the possibility of diminution of his security is the insertion of a covenant or a condition in the mortgage itself, prohibiting the removal of any fixture. Of course, the result of such a condition may be to bring about deterioration of the mortgagee's security as the property becomes worn out or outmoded.

All of what has been said concerning this problem, however, assumes that removal of an essential fixture will be permitted automatically under § 9-313. It has been suggested that the principle of § 1-103 incorporating supplementary principles of law and equity into the Code, might be available to a real estate mortgagee as to whom removal of the fixture might constitute waste.<sup>31</sup> Because removal is not the only remedy available to the secured creditor,<sup>32</sup> a court could construe the removal provision of § 9-313 to permit removal only when it would not substantially destroy the economic value of the realty affected. This position is consistent with courts' longstanding abhorrence of economic waste and their efforts to avoid decisions which would encourage or permit such waste.

There is one situation, however, involving the construction mortgage, in which the legitimate concerns of the real estate mortgagee were overlooked by the 1962 text of § 9-313. A construction mortgagee, generally, is one who makes periodic advances on the basis of a previous commitment to the owner/debtor for the construction of a building or other improvement on land. Construction may well include the attachment of fixtures. In this case, the possibility of double financing by the owner-debtor is apparent, and a construction mortgagee who has legitimate expectations that the security for his first mortgage will include fixtures may be disappointed to learn that purchase money lenders have obtained a priority under § 9-313.<sup>33</sup> As one who is putting up "new money" for the construc-

---

<sup>30</sup> The present Ohio version of § 9-313 provides that "[t]he secured party shall give reasonable notification of his intention to remove the collateral to all persons entitled to reimbursement." OHIO REV. CODE ANN. § 1309.32(C) (Page Supp. 1972). This minor amendment, which in all probability reflects current business practices on the part of secured creditors who appreciate being paid off by mortgagees, is a desirable one.

<sup>31</sup> Shanker, *supra* note 11, at 806. See also Gilmore, *supra* note 6, at 836.

<sup>32</sup> U.C.C. § 9-501 (1) and (4) (1962 and 1972 Official Text). The secured party's remedies include judgment and foreclosure proceedings.

<sup>33</sup> It is possible for the construction mortgagee to protect himself from this eventuality by the cumbersome process of searching recording files before each advance.

tion of an improvement, including purchase and installation of fixtures, the mortgagee is entitled to the same kind of consideration offered a purchase money lender in § 9-313(2).

It has been suggested that a construction mortgagee may be protected by virtue of § 9-313(4)(c), in that he is a prior creditor making a subsequent advance contracted for before perfection of the competing fixture security interest.<sup>34</sup> The meaning of § 9-313(4)(c) is ambiguous, however, and it can be read to protect the construction mortgagee only if he "makes his commitment or his advance (a) after the security interest has attached and (b) after the affixation of the fixture and (c) before real estate notification."<sup>35</sup> The interest of the construction mortgagee is to obtain a priority as to fixtures which he assumed were purchased with the money he loaned the owner. There is no reason to subject him to the burden of making a search for competing security interests prior to each advance. Once he records his mortgage, he should have priority as to fixtures which are installed during the course of construction, and that priority should take the form of something more than the chink in the armor provided by a liberal reading of § 9-313(4).

Discussion thus far has centered upon only one facet of the priority policy of § 9-313—the relative positions of the secured creditor and the holder of an existing real estate interest. The 1962 version of the U.C.C. relegates the secured creditor to a position inferior to that of "a subsequent purchaser for value of any interest in the real estate"<sup>36</sup> or of "a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances."<sup>37</sup> The subsequent purchase must be made and the subsequent advance must be made or contracted for "without knowledge of the security interest and before it is perfected."<sup>38</sup> A real estate mortgagee will be a purchaser for the purpose of this provision.<sup>39</sup> The purpose of this statutory priority is to protect the subsequent purchaser who extends credit on the basis of the collateral which he sees, including fixtures. That is to say, unless the purchaser knows<sup>40</sup> of the earlier security interest, or unless perfection (public filing) of the competing interest has given him constructive knowledge, the purchaser's rights will be superior. If the word "subsequent" is taken to relate to affixation of the chattel rather than to attachment of the creditor's security interest,<sup>41</sup> the secured creditor

---

<sup>34</sup> Gilmore, *supra* note 6, at 830-32.

<sup>35</sup> Kripke, *supra* note 6, at 73.

<sup>36</sup> U.C.C. § 9-313(4)(a) (1962 Official Text).

<sup>37</sup> U.C.C. § 9-313(4)(c) (1962 Official Text).

<sup>38</sup> *Id.*

<sup>39</sup> U.C.C. § 1-201(32) (1962 Official Text).

<sup>40</sup> "A person 'knows' or has 'knowledge' of a fact when he has actual knowledge of it." U.C.C. § 1-201(25) (1962 Official Text).

<sup>41</sup> See 2 G. GILMORE, *supra* note 6, at 824-28; J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 25-10 at 932-33 (1972) [hereinafter cited as J. WHITE & R. SUMMERS].

will prevail unless the real estate interest arises after affixation and before perfection. This is entirely consistent with the idea that the real estate interest holder could not have considered the fixture in making his credit decision unless the fixture existed (*i.e.*, was affixed) prior to the acquisition of the real estate interest. If the real estate interest arose subsequent to perfection, however, the mortgagee had constructive knowledge of the secured creditor's interest and thus could and should have made his credit decision accordingly.

In amending the uniform language of § 9-313, the Ohio legislature made a radical change in regard to the priority position of the subsequent real estate interest holder. The amended statute provides that the secured creditor will prevail over "all persons acquiring interest in the real estate subsequent to the perfection of such security interest or the affixing of the goods to the real estate, whichever occurs later."<sup>42</sup> The converse implication is that the secured creditor will be inferior to one who acquires his interest in the realty *before* perfection or affixation, whichever occurs later. The effect of the operation of the Ohio rule, in contrast with that of the uniform provision, can be seen in the following examples.

<i>sale of chattel and attachment of security interest</i> (a)	<i>affixation</i> (b)	<i>perfection</i> (c)
---	--------------------------	--------------------------

Under § 9-313(4) of the 1962 Code, the purchaser/mortgagee will prevail only if his interest was acquired between points (b) and (c) . . . after affixation *and* before perfection of the secured creditor's interest. Under the Ohio statute, the purchaser/mortgagee will prevail if he acquired his interest anytime before point (c). Thus, even if the real estate interest was acquired before affixation, which means that the fixture was not in existence for the purpose of the purchaser's decision to buy or to lend, the real estate interest holder will prevail.

An even less desirable result obtains in the following situation.

<i>sale of chattel and attachment of security interest</i> (a)	<i>perfection</i> (b)	<i>affixation</i> (c)
---	--------------------------	--------------------------

Under the uniform provision, the purchaser/mortgagee cannot prevail regardless of the point in time his interest arises, since to prevail his interest must arise after affixation *and* before perfection. On the other hand, under Ohio law, the real estate interest will prevail if it arises anytime before point (c). In addition to giving the real estate interest purchaser a priority

<sup>42</sup> OHIO REV. CODE ANN. § 1309.32(B) (Page Supp. 1972).

as to a fixture not in existence at the time of the purchase, the Ohio provision permits him to ignore a public filing of the secured creditor's interest. The holder of the real estate interest will prevail unless he was hapless enough to acquire his interest after perfection of the secured creditor's interest *and* after affixation of the goods to the realty.

Apart from legitimate concern about the position of a construction mortgagee under the uniform provision, the policy judgment made by the drafters of the 1962 text of § 9-313 is sound. Whatever the difficulties of § 9-313 may be, the basic priority decision incorporated into the uniform text is preferable to the Ohio version. The purchase money secured creditor who adds to the value of the realty by extending credit ought to be preferred over the holder of a real estate interest who is attempting to assert a priority over a fixture which was not in existence at the time of the latter's credit decision. Economic reality dictates that this priority policy will seldom injure the real estate interest holder even when the fixtures are replacements rather than pure additions to the realty. The fact that removal of an essential fixture may be inappropriate when the effect of removal would be to substantially destroy the economic value of the realty does not justify the radical surgery which the Ohio legislature has performed on § 9-313. A priority rule which permits the real estate interest holder to ignore a public filing of notice of a creditor's security interest in the fixture and to obtain priority as to a fixture which was not in existence at the time the real estate interest was acquired is unsupportable in terms of logic or policy.

## 2. Secret Liens

Even assuming the appropriateness of the resolution of basic priority policies of the uniform act, critics have charged that § 9-313 permits secret liens. Thus, the argument goes, not only is the holder of a real estate interest in an inferior position *vis-à-vis* the secured creditor, he may not even be aware of this inferiority. It is certainly true that § 9-313(2) establishes a priority on behalf of some secured creditors absent perfection. As has been pointed out above, the requirement of this provision that the security interest attach to the goods before they become fixtures limits the effect of the rule for practical purposes to purchase money secured creditors. The justification suggested has been "the traditional preferred status of a purchase money secured creditor."<sup>43</sup> Because the priority which a secured creditor obtains under § 9-313(2) relates only to a non-subsequent real estate interest, the provision assumes a fixture which was not considered by the real estate interest holder at the time he acquired his

---

<sup>43</sup> J. WHITE & R. SUMMERS, *supra* note 41, at 927. For a detailed examination of the history and scope of the preference given the purchase money creditor, see Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963) [hereinafter cited as Gilmore].

interest. When the fixture in question amounts to a replacement of an older one, however, it is possible that the security of a mortgagee may be adversely affected without his knowledge, and it is conceivable that a mortgagee may be lulled into a sense of false security by the addition of new fixtures as to which there is no public recording of an outstanding security interest. Nonetheless, it is doubtful that these theoretical problems were of sufficiently practical import to justify the adoption of the revised Ohio statute. Moreover, in response to such criticism the element of secrecy has been virtually eliminated from the 1972 uniform text.

### 3. The Concept of Fixtures under Ohio Law

Finally there remains the question of the compatibility of the concept of fixture envisioned by the drafters of § 9-313 and the definition (or lack of definition) of fixture by the courts of Ohio. Section 9-313 assumes a tripartite classification of property as (1) chattel, (2) realty, and (3) detachable or removable fixture. It is only this third class which is subject to the rule of § 9-313. Judicial decisions in Ohio, on the other hand, have led some to include this state in the minority of jurisdictions which recognize only two basic classifications of property—real and personal—and regard fixtures as the former. Since the definition of fixture for the purpose of § 9-313 is left to state law other than the U.C.C., it is essential to understand the position of the Ohio courts on this question.

The starting point for analysis of Ohio fixture law is *Teaff v. Hewitt*.<sup>44</sup> In particular, one statement in Judge Bartley's opinion in that case has been regarded as creating the basis for an irreconcilable conflict between Ohio's fixture concept and the definitional assumption contained in § 9-313.

A removable fixture as a term of general application, is a solecism—a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles, which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property.<sup>45</sup>

The court continues, making an effort to develop a universal definition of a fixture, as follows: "A fixture is an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it."<sup>46</sup> The opinion specifically rejects any division of fixtures into classifications of removable and irremovable,<sup>47</sup> thus permitting the conclusion by some that Ohio has no "removable fixture" law, which is essential for the functioning of § 9-313.

---

<sup>44</sup> 1 Ohio St. 511 (1853).

<sup>45</sup> *Id.* at 524.

<sup>46</sup> *Id.* at 527.

<sup>47</sup> *Id.* at 525.

A more useful approach to the confusing question raised by this criticism involves a determination of the circumstances in which Ohio courts have permitted a chattel in some way closely related to realty to be removed by a creditor. It is clear that they have done so.<sup>48</sup> When the court has permitted removal, it has determined the property in question to be a chattel; when it has refused to permit removal, it has reached the determination that the property is a fixture, and thus not removable.<sup>49</sup> The problem before the court is not an abstract one of definition; rather it is the resolution of conflicting interests in valuable property. The conflicting interests may be those of heir and personal representative, life tenant and remainderman, vendor and purchaser of realty, mortgagor and mortgagee of realty, landlord and tenant, or a seller or encumbrancer of a chattel and a person having an interest in realty to which the chattel is closely related in some way—the latter situation being the specific focus of § 9-313.

A related question, sometimes discussed in terms of "fixture" law, is that of the nature of property for the purpose of taxation. Ohio courts have announced unchanging criteria for determining when property is a fixture in all of these situations,<sup>50</sup> but they have applied the criteria in what, at first glance, appears to be a contradictory manner. The courts themselves, however, have made it clear that the contradiction is more apparent than real.

Regardless of how the decisions vary respecting the law governing particular classes or the relationship of the parties concerned, they seem never to fail in recognizing that different rules apply to different classes of parties. . . . "An article annexed to lands may for some purposes, and

---

<sup>48</sup> The court in *Teaff v. Hewitt*, 1 Ohio St. 511 (1853), sustained removal by creditors of a steam engine, boilers, four sets of woolen carding machines, a wool-picker, four spinning jacks, two year reels, three bobbin machines, one reaming machine, twenty-one power looms, and one rolling machine.

<sup>49</sup> *Vinton County Nat'l Bank v. Hunt*, 14 Ohio Op. 347 (C.P. Vinton Co. 1939). Professor Gilmore summarizes the situation in so-called "minority jurisdictions" nicely.

We suggested in our earlier discussion that in Massachusetts, and no doubt in other states thought to adhere to the minority rule, the purchase money priority was to a considerable degree maintained, despite the announced doctrinal position, by holding that goods, no matter how irrevocably wrought into a structure, nevertheless remained personal property. That is, goods which in New York were held to be "fixtures" (and therefore removable) were held in Massachusetts to be not fixtures but "personalty" (and therefore removable). The result was the same but the semantics were curiously different.

Gilmore, *supra* note 43, at 1394-95.

<sup>50</sup> These criteria were stated in *Teaff v. Hewitt*, 1 Ohio St. 511, 530 (1853), as follows:

1st. Actual annexation to the realty, or something appurtenant thereto.

2d. Appropriation to the use or purpose of that part of the realty with which it is connected.

3d. The intention of the party making the annexation to make the article a permanent accession of the freehold—this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

as between certain parties, be regarded as part of the realty, while as respects other parties and objects, the same thing may be considered as retaining its character as personalty." (*Warner v. Cleveland & T. R. Co.*, 22 Ohio St. 563).<sup>51</sup>

Thus an opinion announcing that certain machinery constitutes realty or personalty for the purpose of taxation is not particularly relevant to the question of priorities between a chattel seller or lender on the one hand and a holder of a competing real estate interest on the other. The Ohio supreme court underscored this in *Zangerle v. Standard Oil Co.*<sup>52</sup> a case involving an appeal from a decision of the Board of Tax Appeals classifying machinery and equipment used in connection with two oil refineries owned by Standard. The court held the test of *Teaff v. Hewitt* to be controlling, but recognized that the application of the test would be affected by the fact that this was a tax evaluation case. In the course of its opinion, the court stated:

The question here is not complicated by the conflicting interests of lien-holders or those holding equitable rights or estates in the property. The instant case involves the question as to what is personalty and what is real estate in property wholly owned by a taxpayer, who for the assessment of taxes, is entitled to the most liberal interpretation in the favor of the facts which determine and fix the taxability of his property.<sup>53</sup>

Thus in determining what the law of Ohio is in regard to the respective rights of a chattel seller or lender on the one hand and a mortgagee or other holder of an interest in real property on the other, one must examine those cases which deal with those classes of parties.

Turning first to the question of priorities between a seller of a chattel and a person acquiring a subsequent interest in the realty, the Ohio supreme court has held that a subsequent purchaser of the realty who does not have actual notice of the interest of the seller of the chattel will prevail if the chattel has become related to the realty in such a way that a reasonable subsequent purchaser would believe that it was intended to be part of the realty.<sup>54</sup> Absent actual notice on the part of a subsequent mortgagee, the result is the same.<sup>55</sup> Proper filing of the conditional sales contract or the chattel mortgage is not sufficient to provide the element of actual notice required.<sup>56</sup> In the event that actual knowledge of the seller's interest exists, however, the holder of the subsequent real estate

---

<sup>51</sup> *Vinton County Nat'l Bank v. Hunt*, 14 Ohio Op. 347, 349 (C.P. Vinton Co. 1939).

<sup>52</sup> 144 Ohio St. 506, 60 N.E.2d 52 (1945).

<sup>53</sup> *Id.* at 519, 60 N.E.2d at 58.

<sup>54</sup> *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 19 N.E.2d 273. (1939).

<sup>55</sup> *XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corp.*, 56 Ohio App. 188, 10 N.E.2d 229 (1937).

<sup>56</sup> *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N.E. 493 (1887).



interest will be subject to the interest of seller of the chattel.<sup>57</sup> The only qualification announced is that the property must be able to be removed without material injury to the realty or to itself.<sup>58</sup>

These cases do not announce a rule remarkably different from that embodied in § 9-313(4), which favors the subsequent "purchaser for value" who purchases without actual knowledge of the security interest in the fixture. The important change which § 9-313 would have brought about in Ohio law is the effectiveness of "perfection" in providing sufficient constructive notice to the subsequent real estate interest holder to defeat his priority. Modern filing requirements are designed to provide the notice which earlier and simpler filing procedures did not accomplish.<sup>59</sup> Whether the effect of actual notice under the Ohio decisions would result in classification of the property in question as personalty rather than fixture/realty or whether it would result in a holding that a fixture is removable by a seller with a superior interest is not very important. Recognition of the superior rights of the chattel lender under some circumstances is clearly not out of line with Ohio authority.

Moving to the question of priorities between a seller of a chattel and a prior mortgagee, the Ohio supreme court has not provided a definitive answer. It is clear that the court did not deal with this question in *Holland Furnace Co. v. Trumbull*.<sup>60</sup> In that case the subsequent real estate purchaser who prevailed happened also to be a prior mortgagee purchasing at a sale resulting from his earlier foreclosure on the mortgage. In reaching its decision in that case the court stated: "This decision is confined to the facts in this case, which involves the rights of a subsequent purchaser for value, without notice."<sup>61</sup>

---

<sup>57</sup> XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corp., 56 Ohio App. 188, 10 N.E.2d 229 (1937).

<sup>58</sup> *Id.* The requirement that removal be possible without material injury to the realty clearly conflicts with the provision of § 9-313(5). Nonetheless, the Ohio legislature did incorporate this provision of the U.C.C. in adopting the Ohio amendment, OHIO REV. CODE ANN. § 1309.32(C) (Page Supp. 1972), and in so doing overruled the state's common law. The legislative judgment that the reimbursement requirement satisfies all legitimate needs of the party interested in the real estate is sound.

<sup>59</sup> In explaining why filing of a conditional sales contract did not provide notice the Ohio Supreme Court made the following point:

There is nothing . . . which provides or requires any description of the real estate to be affected in case the personal property sold under the conditional sales contract is attached to or becomes a part of the real estate. Furthermore, the statute provides that the contract or copy must be filed in the county where the purchaser resides, if he be a resident of the state. Consequently, if he is a resident of a county other than that in which the real estate to be affected is located, there would be no record whatever in such latter county.

*Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, at 55-56, 19 N.E.2d 273, at 276 (1939). Compare OHIO REV. CODE ANN. § 1309.38(A)(2) (Page 1962).

<sup>60</sup> 135 Ohio St. 48, 19 N.E.2d 273 (1939).

<sup>61</sup> *Id.* at 57, 19 N.E.2d at 277. It is interesting to note that the mortgagee in this case would not have qualified as a "subsequent purchaser" under the 1962 version of § 9-313, which provided that "(a) purchaser of real estate at a foreclosure sale *other than an*

Lower courts in Ohio have reached the conclusion that a prior mortgagee will not prevail over a seller of a chattel, even when the chattel is related to realty in such a way that the court would hold it to be a fixture in a dispute between the seller and a subsequent mortgagee.<sup>62</sup> In language which sounds as though it could have been taken from an official comment in the U.C.C., the court in *East Ohio Building & Loan Co. v. Holland Furnace Co.*<sup>63</sup> provided its rationale for supporting the priority of a purchase money lender over a prior mortgagee.

The great weight of modern authorities upholds such a contract [conditional sales contract] as against a prior secured creditor; particularly when he advanced nothing on the faith of the annexation and the chattel annexed may be detached without impairing the creditor's original security.<sup>64</sup>

In reaching its decision, the court found that the furnace in question remained personalty. Had it determined the furnace to be a removable fixture, the result would have been the same. A fact of great importance in this case is that the parties stipulated that the prior mortgagee had no notice of the conditional sales contract or the interest of the seller. Thus, in keeping with the spirit of § 9-313(2), the court sustained the interest of purchase money secured party, even though that interest took the form of a "secret lien."<sup>65</sup>

For these reasons, the statement that "[t]he leading case of *Teaff v. Hewitt* has been simultaneously incorporated into the code and overruled by it,"<sup>66</sup> is not a definitive statement of Ohio law on the subject. In applying the "universal" test of *Teaff v. Hewitt*, Ohio courts have distinguished cases involving priorities between a lender or a seller of a chattel and a holder of a real estate interest from other kinds of cases, e.g., taxation, landlord/tenant, etc. In determining priorities between chattel and real estate interest holders, the courts have further distinguished subsequent real estate interests from those which arose prior to the improvement

---

*encumbrancer purchasing at his own foreclosure sale* is a subsequent purchaser within this section." (emphasis added) U.C.C. § 9-313(4) (1962 Official Text). This language has been deleted from the 1972 version.

<sup>62</sup> *East Ohio Bldg. & Loan Co. v. Holland Furnace Co.*, 48 Ohio App. 545, 194 N. E. 598 (1934). The near identity of facts in this case and those in *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 19 N.E.2d 273 (1939), is instructive. Both cases involved home furnaces which were not affixed (other than by their own weight) to the owner's dwelling. In reaching conclusions concerning affixation, appropriation to the use of the realty, and intention, the courts reached different conclusions because the one case involved a subsequent purchaser and the other a prior mortgagee. See also *Holland Furnace Co. v. Joy*, 16 Ohio L. Abs. 251 (C.P. Columbiana Co. 1934).

<sup>63</sup> 48 Ohio App. 545, 194 N.E. 598 (1934).

<sup>64</sup> *Id.* at 550-51, 194 N.E. at 600.

<sup>65</sup> There is even some Ohio authority for protection of a nonpurchase money lender's interest against a prior mortgagee, see *Hine v. Morris*, 7 Ohio Dec. Rep. 482 (Mahoning Dist. Ct. 1878).

<sup>66</sup> Hollander, *supra* note 12, at 686.

of the realty. The results in the Ohio cases in both types of situations have been basically consistent with the priority philosophy of § 9-313.

### III. THE 1972 AMENDMENTS TO THE U.C.C. FIXTURE PROVISION

The appearance of the 1972 uniform version of § 9-313 provides an opportunity for legislative reappraisal of statutory priorities relating to collateral in the form of fixtures. A number of criticisms leveled against the earlier version of § 9-313 have been met by the new position. The major changes are the following:

(1) Explicit recognition is made of the special position of the purchase money secured creditor in subsection 4(a) of the new draft. Such a creditor may obtain priority over an existing real estate interest holder of record if the creditor perfects by making a fixture filing within 10 days after the goods become fixtures.<sup>67</sup> The effect of this provision is virtually to eliminate the "secret lien" aspect of the secured creditor's interest and thus to overcome to a very substantial extent one of the major criticisms of the earlier uniform text.

(2) In virtually all other cases (non-purchase money security interests), the secured creditor will not prevail against the holder of the real estate interest unless the former perfects his interest by making a fixture filing before the interest of the other party is of record.<sup>68</sup> Even if the secured party perfects properly, he will not prevail unless "the debtor has an interest of record in the real estate or is in possession of the real estate."<sup>69</sup> The effect of this requirement is to further eliminate the possibility of lack of notice to competing real estate interest holders. A "fixture filing" must be made "in the office where a mortgage on the real estate would be filed or recorded" and must conform to "the requirements of subsection (5) of Section 9-402."<sup>70</sup> Revised § 9-402 (5) requires that the fixture filing describe the real estate and that the name of the record owner be shown on the financing statement if the debtor does not hold an interest of record in the realty. This provision, taken together with the indexing requirements of the amended version of § 9-403(7), insures that the interest of the Article 9 creditor will be known to any reasonable searcher of the real estate records.

(3) Two circumstances exist under the new statute in which the se-

---

<sup>67</sup> This means that a financing statement must be filed. U.C.C. § 9-302(1)(d) (1972 Official Text) specifically requires filing in the case of a purchase money security interest in consumer goods when they are fixtures. The 10-day filing requirement in U.C.C. § 9-313(4)(a) (1972 Official Text) incorporates the general code approach to purchase money security interests reflected in U.C.C. § 9-312(4) (1972 Official Text) and applies it to such interests when the collateral is a fixture.

<sup>68</sup> U.C.C. § 9-313(4)(b) (1972 Official Text).

<sup>69</sup> *Id.*

<sup>70</sup> U.C.C. § 9-313(1)(b) (1972 Official Text).

cured party may prevail over a real estate interest holder in spite of the absence of a fixture filing. The first of these occurs when "the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods."<sup>71</sup> The fixture lender will prevail if he has perfected his interest "by any method permitted by this Article"<sup>72</sup> before the goods become fixtures. The purpose of this section is to reduce the difficulty of the fixture lender in a class of cases in which the status of the chattel as a fixture is somewhat tenuous. For this reason it has been suggested that it is not unfair to require a real estate buyer or mortgagee to make a check of chattel records.<sup>73</sup> The section becomes operative, of course, only if the chattels affected may be classified as fixtures under local law.

The provision raises a number of definitional problems: (1) What is meant by "readily removable"? (2) What is a factory or office machine? (3) What is the scope of the term "domestic appliance"? One author has pointed out that fixture filing or dual fixture and chattel filing may be the only safe course for a lender/seller until these questions are clarified by litigation.<sup>74</sup> It is interesting to note that the drafters of revised § 9-313 originally attempted to define "fixture" for purposes of the section, and that the definition stated "readily removable factory and office machines and readily removable replacements of domestic appliances are not fixtures."<sup>75</sup> Having abandoned the effort to accomplish a uniform definition of the term "fixture," the drafters have none the less chosen to treat an ambiguously and somewhat arbitrarily<sup>76</sup> defined class of goods in a different manner for purposes of Article 9. The conflicting interests of the secured lender and a real estate mortgagee or purchaser ought to be resolved in connection with the determination of the status of the chattel involved, *i.e.*, is it a fixture? If the chattel may be classified as a fixture, the real estate interest holder ought to be given the benefit of a fixture filing.

Subsection 4(d) of revised § 9-313 permits the secured creditor who

---

<sup>71</sup> U.C.C. § 9-313(4)(c) (1972 Official Text).

<sup>72</sup> *Id.*

<sup>73</sup> For purposes of this section, perfection "by any method permitted by this article" will generally be a chattel filing; in the case of consumer goods, automatic perfection without filing is possible under § 9-302(1)(d) if the security interest is of the purchase money variety. Comment 4(d) of the 1972 version of § 9-313 makes it clear that the drafters intend that no filing whatsoever is required in connection with a purchase money security interest in replacement of consumer goods.

<sup>74</sup> Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 496-97 (1973) [hereinafter cited as Coogan].

<sup>75</sup> PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PRELIMINARY DRAFT NO. 1. SUBPARAGRAPH 9-313(1)(b)(i) (Nov. 20, 1968), 5 U.C.C. REP. SERV. 1135 (1969).

<sup>76</sup> Coogan noted the inconsistency in treating a farmer's milk cooling equipment differently from a factory or office machine. Coogan, *supra* note 74, at 497.

has perfected by any method permitted by Article 9 to prevail over a real estate lien acquired after perfection. This provision is not relevant to the problem of a real estate mortgagee or purchaser, but relates only to the general creditor who attempts to satisfy his judgment against the debtor's property or to the hypothetical lien creditor who figures prominently in bankruptcy proceedings. The decision to dispense with the need for a fixture filing in these kinds of cases is an appropriate one.

(4) The status of the construction mortgagee is dealt with explicitly in subsection 6 of the new statute.<sup>77</sup> If the construction mortgage is recorded before the goods become fixtures, and if the goods become fixtures before the completion of the construction process, the mortgagee will prevail over a purchase money secured party who would otherwise prevail under subsection 4(a) of § 9-313. Although subsection 6 subjects the construction mortgagee to the remaining provisions of subsections 4 and 5, the mortgagee is likely to have recorded before any filing of a fixture interest and will thus prevail over any fixture lender.

The 1972 text of § 9-313 continues to leave the question of what is a fixture to local law, but specifies that "ordinary building materials incorporated into an improvement on land"<sup>78</sup> may not be the subject of a security interest. Like the earlier text, the new provision recognizes that the real estate mortgagee may encumber fixtures. No perfection of any kind is required if the secured party has obtained consent or a disclaimer from the real estate interest holder or if the debtor has the right to remove the goods as against the encumbrancer or owner.<sup>79</sup> The new act states that the fixture lender will be subordinate to any conflicting owner or encumbrancer unless the lender has obtained a priority under one of the specific provisions of the statute. Finally, the secured party's right to removal is unchanged in the new text.

It is this author's opinion that the basic priority scheme of the 1972 text of § 9-313 satisfies the legitimate interests of the fixture lender and the real estate mortgagee or purchaser and ought to be adopted by the Ohio legislature with certain modifications which will not affect the priority policy or interfere unduly with the goal of uniformity sought by the sponsors of the uniform act. The most serious criticisms of the earlier version of § 9-313, those relating to secrecy, have been met by the new provision. The only situation in which a prior recordation of a real estate interest will not suffice to overcome the interest of the fixture lender is

---

<sup>77</sup> "Construction mortgage" is defined as follows in the revised text: "[A] mortgage is a 'construction mortgage' to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates." U.C.C. § 9-313(1)(c) (1972 Official Text).

<sup>78</sup> U.C.C. § 9-313(2) (1972 Official Text).

<sup>79</sup> This last provision is intended to fix the "status of fixtures installed by tenants (as well as such persons as licensees and holders of easement)." U.C.C. § 9-313, Comment 6 (1972 Official Text).

the case of the purchase money security interest. Even in that case, the interest of the secured party must arise before the goods become fixtures, a fixture filing within 10 days after the goods become fixtures is required, and the debtor must either have an interest of record in the real estate or be in possession thereof. The limited priority of the purchase money secured party goes no further than necessary to insure a source of credit (other than the mortgagee) for needed and valuable improvements to real estate. The most serious possibility of double financing and the resulting interference with legitimate mortgagee interests have been obviated by the priority accorded to a construction mortgage.

The difficulty which remains in the 1972 version of the statute is not related to the basic priority policy which it articulates. What is required in Ohio, and what has always been required, is a definition of fixture for purposes of the statute. Adoption of a definition will permit removal of subsection (4)(c) of the act which introduces needless ambiguity and possible unfairness into the priority scheme. The substitution of a definition of fixture for subsection (1)(a) of the act, a definition of "ordinary building materials," and removal of subsection (4)(c) will result in the clearest possible legislative statement on this difficult subject. Legislative rather than judicial definition of fixture for the purpose of § 9-313 is not inconsistent with the intent of the sponsors of the uniform act.<sup>80</sup> Such a definition will have the effect of clarifying the scope of § 9-313 in Ohio, but it will not contradict the results which Ohio courts have actually reached in cases involving priority disputes. In addition, in order to insure that the holder of the real estate interest will know in advance of any removal of collateral by a superior secured party, the present Ohio provision requiring notification of intention to remove to any person entitled to reimbursement may be appended to subsection 8 of the amended statute without undue violence to the concept of uniformity.

#### IV. A PROPOSED DEFINITION OF FIXTURES FOR ARTICLE 9

In determining the scope of the fixture concept, it is important that the legislature limit itself to the problem which is addressed by § 9-313. That section is not concerned about the rights of a tenant vis-à-vis his landlord or classification of property for tax purposes. Thus it is not necessary for the legislature to consider the scope of the term as it applies to these situations. What is needed is a definition of fixture which will provide

---

<sup>80</sup> The application of § 9-313 in a minority jurisdiction which rejects the concept of a removable fixture will result in chaos, even though the minority position is a matter of semantics rather than substance. Absent a uniform fixture definition or some "completely different approach" to the mechanisms which establish § 9-313 priorities, Professor Gilmore has stated that "the only solution (at least for the minority rule states) will be the inclusion of a fixture definition—whose drafting will no doubt prove to be as difficult as the original draftsmen had anticipated." Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1396 (1963).

a framework for the operation of priority provisions which assume on the one hand a seller or lender who wishes to obtain a security interest in a fixture and a mortgagee or subsequent purchaser of the realty on the other hand.

An examination of several attempts to establish a uniform definition of the term for inclusion in § 9-313 provides a useful starting point for the legislature, in spite of the fact that no definition found its way into the 1972 version of the uniform act. The fact that it may be difficult or impossible to get fifty legislatures to agree upon a common definition does not detract from the usefulness of a statutory definition by one legislature. The Review Committee for Article 9, in its first preliminary draft, proposed the following definition:

Section 9-313. Priority of Security Interests in Fixtures.

(1) (a) This section governs the priority between a security interest in goods, including fixtures, and a real estate interest in the goods. The declaration in this section that certain goods are not fixtures is only for the purpose of the priority rules stated in this section, and does not determine whether an interest in the goods passes under a conveyance or mortgage of the real estate or whether the goods are part of real estate under the law of this state other than this Act.

(b) For the purpose of this Section and the provisions in Part 4 of this Article referring to fixture filing, the following definitions apply:

(i) Goods are "fixtures" when they are so related to particular real estate that under the law of this state other than this Act an interest in the goods would pass as part of the real estate under a conveyance or mortgage thereof without specific mention of the goods, except as stated in this paragraph. Where ordinary building materials are incorporated in an improvement upon land, which improvement is itself not a fixture, the materials are real estate and not a fixture. An improvement upon land is not a fixture unless it is readily removable from the land. Readily removable factory and office machines and readily removable replacements of domestic appliances are not fixtures. Where the debtor is a tenant, goods which he has a right to remove are not fixtures but are personal property. Standing timber and growing crops and oil, gas and minerals before severance are not fixtures.

(ii) The term 'ordinary building materials' include lumber, millwork, brick, tile, siding, roofing, cement, glass, wiring, piping and structural members, other than readily removable items of special value such as ornamental metal work, ornamental mantels and carved panelling.<sup>81</sup>

The principal element of the Revision Committee's definition is contained in the first sentence of subsection (1)(b)(i) which provides that goods will be fixtures for the purpose of code priorities whenever they would be regarded as fixtures under other state law in connection with a

---

<sup>81</sup> PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PRELIMINARY DRAFT NO. 1, SUBPARAGRAPHS 9-313(1)(b)(i), (ii) (Nov. 20, 1968), 5 U.C.C. REP. SERV. 1135 (1969).

conveyance or mortgage. No further guidance is provided apart from specific exceptions which are carved out and declared not to be fixtures.

Peter F. Coogan, a consultant to the Article 9 Review Committee, offered a definition for inclusion in § 9-313 in an article written in 1965:

9-313. Security Interests in Fixtures.

(1) The following rules govern the application of this Article to goods associated with particular real estate.

(a) Neither the fixture rules nor any other rules of this Article shall apply to goods after they have become building materials, and no security interest in them can thereafter exist under this Article. Fixture rules include those of this section 9-313 and the fixture filing rules of Part 4 of this Article.

The term building materials includes goods that have become so incorporated or built into a building that their removal therefrom would necessarily involve the removal or destruction of some part of the building and thereby cause substantial damage to the building apart from the value of the goods removed, but the term does not include goods that are severable from the land merely by unscrewing, unbolting, unclamping or uncoupling, or some other method of disconnection, and does not include equipment or consumer goods installed in a building for use in the carrying on of an industry or activity where the only substantial damage, apart from the value of the equipment or consumer goods removed, that would necessarily be caused to the building in removing the equipment or consumer goods therefrom is that arising from the removal or destruction of the bed or casting on or in which the item is set and the making or enlargement of an opening in the walls of the building sufficient for the removal from the building. Building includes a structure, erection, or mine, erected or constructed on or in land.

This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate, *but the priorities established by this section shall control where applicable.*

(b) The fixture rules do not apply to any collateral other than equipment or consumer goods, nor to equipment or consumer goods not physically affixed to the realty, nor to such goods physically attached *only* by electrical cords or temporary water connections, nor do they apply to equipment physically attached *only* for a purpose such as reducing noise or vibration, or holding the equipment in place. Security interests in such collateral are covered by sections of Article 9 other than the fixture rules.

(c) The fixture provisions of this Article apply to equipment and consumer goods which relate to the functioning of the building, for whatever purpose it may be used (as distinguished from the functioning of particular activities conducted therein), including goods used for plumbing, heating, air conditioning, refrigeration, sprinkling systems and other equipment and consumer goods which are customarily physically affixed to the real estate, not including building materials referred to in subdivision (a) nor goods attached only for the purposes set forth in subdivision (b). Notwithstanding the provisions of paragraphs (a) and (b), such fixture



rules apply to portable buildings other than those required to be registered or licensed in connection with motor vehicle laws.<sup>82</sup>

This definition reflects the tripartite division of property into (1) realty (incorporated building materials); (2) personalty (farm products, inventory, non-affixed or slightly affixed equipment or consumer goods, consumer goods or equipment affixed solely for the purpose of reducing noise, vibration, or for holding equipment in place); and (3) fixtures (physically affixed equipment and consumer goods related to the functioning of the building as opposed to the functioning of whatever activity is conducted therein,<sup>83</sup> and certain portable buildings).<sup>84</sup>

In addition to these proposals for uniform definitions, two state legislatures have included statutory definitions in their versions of § 9-313.<sup>85</sup>

The purpose of a fixture definition in § 9-313 is to alert a secured creditor to those situations in which he is faced with the possibility of a competing real estate interest in the same collateral. A warning that the chattel which the creditor is accepting as collateral will or may become a fixture subject to such a conflicting interest will permit him to make a fixture filing and thereby protect his interest to the extent permitted by § 9-313. Thus the code definition must be coextensive with the fixture concept which affects real estate mortgagees and purchasers of realty. The Revision Committee recognized this need when it framed a definition in terms of noncode state law determining when "an interest in the goods would pass as part of the real estate under a conveyance or mortgage thereof without specific mention of the goods." The weakness of the Review Committee's proposal is that it provides little guidance to the solu-

<sup>82</sup> Coogan, *Fixtures—Uniformity in Words or Fact?*, 113 U. PA. L. REV. 1186, 1226-27 (1965).

<sup>83</sup> This distinction is not unlike that made in Ohio many years ago in connection with "motive power" machinery as opposed to that propelled by motive power machinery. *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493 (1887).

<sup>84</sup> Another proposal, combining features of both the Review Committee and the Coogan definitions, is contained in a Note, *Toward a Satisfactory Fixture Definition for the Uniform Commercial Code*, 55 CORNELL L. REV. 477 (1970). That proposed definition adopts the tripartite approach of Coogan, with some simplification of the ordinary building materials portion, but includes the statement of the Review Committee limiting the operation of the definition to § 9-313 questions.

<sup>85</sup> A fixture as used in this act is hereby defined to mean, 'that which is affixed to realty or at last so mechanically fitted so as to become a part thereof and not to be separable without material injury to the freehold, or which is necessary to the continued existence or operation of the enterprise or institution as it is carried on upon the premises. IDAHO CODE § 28-9-313(1) (1967).

Following the first sentence of § 9-313(1) dealing with structural materials, the Kansas statute contains the following statement:

Other goods become fixtures under this act when affixing them to real estate so associates them with the real estate that, in the absence of any agreement or understanding with his vendor as to the goods, a purchaser of real estate with knowledge of interests of others of record, or in possession, would reasonably consider the goods to have been purchased as part of the real estate.

KAN. STAT. ANN. § 84-9-313(1) (1972 Supp.).

tion of a specific problem, and it has been contrasted unfavorably in this respect with Mr. Coogan's suggested definition.<sup>86</sup>

It is true that the Coogan proposal offers more guidance to a businessman, lawyer, or court as a result of its greater detail. It is a laudable attempt to insert a degree of specificity and certainty into a complex and confused area of law. The definition, however, presents two important difficulties. The first, inherent in any attempt at detailed definition, is that the definition may be outstripped by technological developments relating to new kinds of goods and methods of installation.<sup>87</sup> The second is that such a definition creates the possibility of lack of co-extensiveness between the code definition and common law determinations of what is a fixture for the purpose of a mortgagee's security or a realty purchaser's rights vis-à-vis a mortgagor or seller. For example, in requiring that goods be physically attached to realty before they can become fixtures, the definition ignores a number of decisions which have dispensed with the requirement of actual physical affixation and which have recognized the concept of constructive annexation.<sup>88</sup> The Ohio supreme court has indicated that the test of physical annexation is the least important of the criteria announced by the court in *Teaff v. Hewitt*,<sup>89</sup> and a court of appeals has recognized the doctrine of constructive annexation.<sup>90</sup> Mr. Coogan's requirement that attachment be accomplished by something more than an electrical cord or temporary water connection presents an even greater potential conflict with the trend of common law decisions which tend to construe the interests of mortgagees and purchasers broadly.<sup>91</sup>

The effect of a code definition which is less inclusive than common law fixture concepts as they apply to mortgagees and purchasers will be an inevitable source of difficulty. For example, assume a chattel within the scope of subsection (1)(b) of Mr. Coogan's proposal which might none the less be regarded fairly as being within the scope of a mortgagee's security, *i.e.*, a fixture, on the basis of the trend of judicial decisions in this area. The seller of the chattel, wishing to reserve a purchase money

---

<sup>86</sup> Note, *Toward a Satisfactory Fixture Definition for the Uniform Commercial Code*, 55 CORNELL L. REV. 477, 483-84 (1970).

<sup>87</sup> 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 30.5, at 819 (1965).

<sup>88</sup> R. BROWN, PERSONAL PROPERTY § 138 at 706-08 (2d ed. 1955). In *Leisle v. Welfare Building & Loan Ass'n*, 232 Wis. 440, 287 N.W. 739 (1939), the Supreme Court of Wisconsin held rollaway beds, unattached in any way to the apartment building in which they were located, to be fixtures within the scope of the mortgagee's security.

<sup>89</sup> *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 19 N.E.2d 273 (1939).

<sup>90</sup> *XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corp.*, 56 Ohio App. 188, 10 N.E.2d 229 (1937).

<sup>91</sup> The mortgagor, being the owner of the property, will presumably have intended all of his additions which are actually or constructively attached to the land and which are adapted to the use of the land to become a permanent part thereof.  
5 AMERICAN LAW OF PROPERTY § 19.7 at 29 (1952).

security interest, determines that no fixture filing is required by § 9-313 and perfects by another method permitted by Article 9. When the conflict between the seller and mortgagee arises, the seller argues that he has done all that the code requires; the mortgagee responds that he has been deprived of fair notice since the real estate records were silent about the seller's interest in property covered by the mortgage.<sup>92</sup> If the resolution of this conflict results in recognition of the mortgagee's superiority, the § 9-313 definition has misled the chattel seller. On the other hand, a resolution favoring the seller under these circumstances permits the narrow code definition to operate to defeat the reasonable expectations of the mortgagee. An answer may be suggested that a reasonable mortgagee should read § 9-313 and should realize that conflicting decisional law has been overruled thereby in so far as it affects priority disputes. However, the effect of the fixture definition in § 9-313 is to deprive the mortgagee of the benefit of a fixture filing as to goods which are fixtures for the purpose of their passing under a mortgage, but personalty for the purpose of establishing the priority of the purchase money seller. Even more alarming to a mortgagee is the possibility that the definition may be applied by a court to cases involving only the interests of mortgagor and mortgagee, an effect obviously unintended by anyone.

These considerations have led the author to propose a definition of fixture for inclusion in the 1972 Ohio version of § 9-313 which provides somewhat more guidance than is offered by the Revision Committee, but which avoids the problems created by an attempt at detailed definition. The proposed definition relates to the very tests utilized by courts in determining the scope of a mortgagee's security or a purchaser's rights in relation to a mortgagor or seller of realty.<sup>93</sup> The effect of such an approach is to provide less in the way of concrete criteria, but to permit a mortgagee or purchaser of realty to receive the full benefit of the new filing requirements in all cases in which he may reasonably expect them to be relevant. A definition stated in terms of general criteria will require judicial interpretation and application; this is certainly equally true of the Revision Committee's proposal as well as certain aspects of the Coogan proposal. In order to know whether or not a particular transaction falls within the scope of § 9-313, it will be necessary for a seller or lender to make inquiries concerning the use to be made of the chattel which

---

<sup>92</sup> Professor Kripke is correct when he states that the result of a code definition narrower than a state's conception of what would pass under a real estate conveyance would be a problem without a rule of decision under the code. Kripke, *supra* note 6, at 63-64. The priorities between the seller of goods and the mortgagee would not fall within the scope of § 9-313 since the goods would not be fixtures within the definition of that section; at the same time the interest of the real estate mortgagee is not a security interest within the scope of § 9-312.

<sup>93</sup> The text of revised § 9-313, including the author's proposed amendments, is contained in the appendix to this article, *infra*.

is to serve as collateral. Such a burden of inquiry is already placed upon sellers and lenders in connection with classification of collateral<sup>94</sup> and is not unreasonable.

The proposed definition begins with the Review Committee's concept that goods are fixtures for the purpose of § 9-313 when they would pass as part of the real estate under a conveyance or mortgage of the real estate without specific mention of the goods. It proceeds to state the criteria which determine when such an interest will pass. This approach may be criticized as being an unwarranted intrusion "into substantive rules of the law of real estate conveyancing."<sup>95</sup> However, the author has attempted to limit the scope of any intrusion by the language of subsection (3) of his proposal. The proposed fixture definition is clearly not germane to taxation, landlord/tenant, and eminent domain questions, for example. The definition does affect substantive real estate law concepts as they relate to the rights of a mortgagee against mortgagor as well as those of a purchaser of real estate against a seller. This is preferable, however, to a code definition which is narrower than the substantive real estate concept and is justified by the additional guidance which the definition provides to interested parties in an area in which code and real estate concepts are inextricably intertwined.

The general criteria utilized in this definition reflect those which are applied consistently by courts in determining the scope of a mortgagee's security or a purchaser's rights in relation to a mortgagor or seller. The test of whether or not a chattel becomes a fixture for these purposes is determined by the objective intent of a reasonable annexor, "to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put."<sup>96</sup> The emphasis upon the various factors indicating objective intent will vary from case to case.

Sometimes the permanency of annexation is the determining factor in construing the intent of the annexor; in others the controlling factor is the importance of the chattel to the operating unit, or the damage which would result to the land or the chattel on removal.<sup>97</sup>

The author's proposed definition recognizes that in some cases degree and manner of affixation may be controlling while in others adaptation to use may overcome the complete absence of physical affixation. It eliminates the need for the specific reference to readily removable collateral contained

---

<sup>94</sup> U.C.C. § 9-109 (1962 Official Text). For a discussion of this problem, see WHITE & SUMMERS, *UNIFORM COMMERCIAL CODE* § 23-13 (1972).

<sup>95</sup> Professor Kripke has so characterized efforts at solutions which lie between the generality of the Review Committee definition on the one hand and the specificity of the Coogan proposal on the other. Kripke, *supra* note 6, at 64.

<sup>96</sup> BROWN, *PERSONAL PROPERTY* § 141, at 726 (2d ed. 1955).

<sup>97</sup> 5 *AMERICAN LAW OF PROPERTY* § 19.7, at 29 (1952).

in the 1972 version of § 9-313(4)(c). By insuring that holders of real estate interests will be given the benefit of the new and expanded filing requirements of the 1972 uniform act in all cases in which such parties have a judicially recognized interest in the collateral, the proposed version of the statute will meet all legitimate needs of real estate lenders and purchasers while permitting valuable and necessary improvements to be financed by secured creditors who are disadvantaged by the present Ohio statute.

## APPENDIX

### PROPOSAL FOR A REVISED OHIO RULE TO DETERMINE PRIORITIES IN FIXTURE COLLATERAL

#### 9-313. PRIORITY OF SECURITY INTERESTS IN FIXTURES

(1) In this section and in the provisions of Part 4 of this Article referring to fixture filing, unless the context otherwise requires

(a) goods other than ordinary building materials as defined by Subsection 2 of this section are "fixtures" when they are so related to particular real estate that an interest in the goods will pass as part of the real estate under a conveyance or mortgage thereof without specific mention of the goods. Such an interest will pass

(i) when the goods are physically attached to realty in such a way that their removal will result in substantial injury to the goods or to the real estate (apart from diminution in value of the real estate caused by the absence of the goods or any need to replace them); or

(ii) when the goods, whether or not they are physically attached to the realty, are so necessary to the functioning, use, or enjoyment of the realty itself (as distinguished from a particular business or activity conducted thereon) that they may be regarded reasonably as having been intended by the affixor or owner to be permanent additions to the realty.

(b) a "fixture filing" is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of Section 9-402.

(c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this Article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this Article in ordinary building materials incorporated into an improvement on land.

(a) The term "ordinary building materials" refers to goods on the order of lumber, millwork, brick, tile, siding, roofing, cement, glass, wiring, piping, and structural members.

(b) The term "incorporated" means built into an improvement on land in such a way that the removal of the building materials would necessarily involve the destruction or removal of some part of the improvement itself. It does not include goods which are severable merely by unscrewing, unbolting, unclamping, uncoupling, or a similar method of disconnection.

(3) This section determines when goods are fixtures for the purpose of passing under a conveyance or mortgage of real estate without specific mention of the goods and for the purpose of the priority rules stated in this section. This section does not determine whether goods are part of real estate for any other purpose under the law of this state other than this Act. This Article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law, but the priorities established by this section shall control where applicable.

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(7) In cases not within the preceding subsections, a security interest in

fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. The secured party shall give reasonable notification of his intention to remove the collateral to all persons entitled to reimbursement.

# WILDCAT STRIKES

## TABLE OF CONTENTS

### INTRODUCTION

I. CONFLICT AND FEDERAL LABOR POLICY .....	752
A. <i>An Introduction to the Problem Presented by         Wildcat Strikes</i> .....	752
B. <i>The Contours of the Term Wildcat</i> .....	754
1. <i>Definitional Problems</i> .....	754
2. <i>An Initial Glance at Causes and Objectives</i> .....	756
C. <i>Wildcat Strikes and the Law:         The Need for Causative Investigation</i> .....	759
II. AN EVALUATION OF TRADITIONAL PERSPECTIVES ON WILDCAT STRIKES .....	761
A. <i>Employee Conflict and Institutional Interests</i> .....	761
B. <i>The "Illogic" of Collective Action</i> .....	764
C. <i>The Breakdown of Channels of Communication</i> .....	767
D. <i>The Incidence and Economic Effect of Wildcat Strikes</i> .....	770
E. <i>A Brief Look at Legal Objections to Wildcat Strikes</i> .....	772
III. WORK GROUP BEHAVIOR AND THE EFFECT OF TECHNOLOGY .....	776
A. <i>Cohesiveness and Technology</i> .....	776
B. <i>The Sayles' Study</i> .....	778
1. <i>Relationship of the Work Done to Wildcat Activity</i> .....	778
a. <i>Apathetic Groups</i> .....	778
b. <i>Erratic Groups</i> .....	779
c. <i>Strategic Groups</i> .....	780
d. <i>Conservative Groups</i> .....	782
2. <i>Intergroup Factors and Behavior Patterns</i> .....	783
a. <i>The Job Status Ladder</i> .....	783
b. <i>Size of the Work Group</i> .....	785
c. <i>Homogeneity of the Work Tasks</i> .....	786
d. <i>Interdependence of the Work Process</i> .....	786
e. <i>Work Standards Involving Judgment</i> .....	787
3. <i>Internal Organization of the Work Group             and Behavior Patterns</i> .....	787
C. <i>Fractional Bargaining</i> .....	790
IV. THE CAUSES AND FUNCTIONS OF WILDCAT STRIKES .....	792
A. <i>The Role of Disorder in Industrial Relations</i> .....	793
B. <i>Conflicts Between Normative Structures</i> .....	795
C. <i>Changes in the Industrial Social System and Employees'         Perception of Unfairness</i> .....	797
D. <i>Economic and Psychological Perspectives of Wildcat Strikes</i> .....	799
E. <i>Wildcat Strikes and the Grievance System</i> .....	802
F. <i>The Contract as a Stabilizing Influence</i> .....	804
G. <i>The Function of Conflict</i> .....	805
V. THE DETERRENT VALUE OF SANCTIONS .....	809
A. <i>Wildcats and Union Responsibility</i> .....	812
B. <i>Penalties and Deterrents</i> .....	813
C. <i>The Fortuitousness of Sanctions</i> .....	814
CONCLUSION .....	816